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action for damages for the pollution of plaintiff's well owing to defendants' maintenance of a cesspool upon their land, the erroneous refusal of the trial court to strike defendants' pleas, setting up the one and three year statute of limitations, must be considered prejudicial; there being nothing in the record affirmatively showing that plaintiff was not harmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4110-4114; Dec. Dig. § 1042.* 1 Va.-W. Va. Enc. Dig. 597; 14 Va.-W. Va. Enc. Dig. 95; 15 Va.-W. Va. Enc. Dig. 70.]

Error to Circuit Court, Loudoun County.

Trespass on the case by Eugene Hawling against John D. Chapin and others. There was a judgment for defendants, and plaintiff brings error. Reversed and remanded.

Richard H. Tebbs and *Cecil Connor*, both of Leesburg, for plaintiff in error.

E. E. Garrett, of Leesburg, for defendants in error.

PEEK *v.* CITY OF HAMPTON.

Jan. 15, 1914.

[80 S. E. 593.]

1. Bridges (§ 1*)—Authority to Construct.—The expediency of building a bridge by a city under authority of the Legislature cannot be questioned in the courts.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. § 1; Dec. Dig. § 1.* 2 Va.-W. Va. Enc. Dig. 624; 14 Va.-W. Va. Enc. Dig. 176; 15 Va.-W. Va. Enc. Dig. 144.]

2. Appeal and Error (§ 176*)—Questions in Trial Court—Admissions.—Where, in an action against a city for damages resulting from the construction of a bridge, counsel agreed that the bridge was constructed by the city "under legal authority," and the court instructed that the legal power of the city to build the bridge was not in issue, but that did not exonerate the city from paying damages caused by its construction, it cannot be contended on appeal that the bridge was built without legal authority.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1066; Dec. Dig. § 176.* 1 Va.-W. Va. Enc. Dig. 609; 14 Va.-W. Va. Enc. Dig. 99; 15 Va.-W. Va. Enc. Dig. 72.]

3. Eminent Domain (§ 307*)—Action for Damages—Instructions.—In trespass on the case for damages for injury to plaintiff's riparian rights by the construction of a bridge by defendant city,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

requested charges based upon the theory that plaintiff could recover for the value of property actually taken were properly refused.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 820-824; Dec. Dig. § 307 * 5 Va.-W. Va. Enc. Dig. 114.]

4. Trial (§ 252*)—Instructions—Applicability to Evidence.—Requested instructions are properly refused, unless there is some evidence tending to prove the facts on which they are based.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.* 7 Va.-W. Va. Enc. Dig. 718; 14 Va.-W. Va. Enc. Dig. 563; 15 Va.-W. Va. Enc. Dig. 531.]

5. Eminent Domain (§ 84*)—Riparian Rights—Compensation.—The rights of a riparian owner in the land between the low-water mark and the line of navigability cannot be injured or taken except for the public good upon paying compensation; such right not being a mere easement in the surface of the water, but being a property right in the soil thereunder.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 227-230; Dec. Dig. § 84.* 5 Va.-W. Va. Enc. Dig. 88; 14 Va.-W. Va. Enc. Dig. 389; 15 Va.-W. Va. Enc. Dig. 333.]

6. Trial (§ 253*)—Instructions—Requests—Applicability to Evidence.—Requested instructions which ignored the evidence by peremptorily directing a verdict for plaintiff were properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. 253.* 7 Va.-W. Va. Enc. Dig. 723; 14 Va.-W. Va. Enc. Dig. 564; 15 Va.-W. Va. Enc. Dig. 515.]

7. Appeal and Error (§ 1067*)—Harmless Error—Instructions.—A requested instruction, in an action for damages for trespass upon plaintiff's riparian rights by the building of a bridge by defendant city, which was given as modified, stated that, in determining whether the bridge damaged plaintiff's property, the jury must consider any and all uses to which plaintiff's property might have been put "in the reasonably near future" but for the bridge, whether for residential, industrial, or commercial purposes. Held, that the modification of the requested charge by adding the quoted words was not prejudicial to plaintiff, where it enlarged the right of recovery beyond that claimed in the instruction requested by it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. § 1067.* 1 Va.-W. Va. Enc. Dig. 600; 14 Va.-W. Va. Enc. Dig. 96; 15 Va.-W. Va. Enc. Dig. 70.]

8. Trial (§ 243*)—Instructions—Conflicting Instructions.—An instruction, in an action for damages for trespass upon plaintiff's riparian rights by the construction of a bridge, that, in considering whether the bridge damaged the property, the jury must consider all uses to which the property might have been put in the reason-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

ably near future but for the bridge did not conflict with an instruction requiring the jury to consider the value of the property immediately before and immediately after the bridge was constructed by considering its uses and capabilities for the present and reasonably near future.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 564, 565; Dec. Dig. § 243.* 7 Va.-W. Va. Enc. Dig. 729; 14 Va.-W. Va. Enc. Dig. 564; 15 Va.-W. Va. Enc. Dig. 518.]

9. Trial (§ 295*)—Instructions—Construction.—Instructions should be construed as a whole.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.* 7 Va.-W. Va. Enc. Dig. 743; 14 Va.-W. Va. Enc. Dig. 566; 15 Va.-W. Va. Enc. Dig. 521.]

Error to Circuit Court of City of Elizabeth.

Suit by Sallie H. Peek against the city of Hampton. Judgment for defendant, and plaintiff brings error. Affirmed.

S. Gordon Cumming and *S. J. Dudley*, both of Hampton, for plaintiff in error.

Wm. C. L. Taliaferro, of Hampton, for defendant in error.

EICHELBERGER *v.* MANN.

Jan. 15, 1914.

[80 S. E. 595.]

1. Corporations (§ 76*)—Subscription to Stock—Notice of Organization Meeting.—Code 1904, § 1105a (4), provides that the subscribers to stock of a corporation shall be given 10 days' notice of the organization meeting unless all of the shareholders are present or represented, or unless notice is waived in writing by such of the subscribers as are absent. Defendant was a subscriber to the capital stock of a corporation, and he alone was absent at the organization meeting; it appearing that he was notified of the meeting by telephone on the day it was held, but that the 10 days' notice was not given. Held, that as the failure to give him notice only rendered the proceedings voidable as to him, his execution of a general proxy in writing thereafter was a ratification of the meeting rendering him liable on his subscription contract, and hence the collection of his subscription might be made by motion under section 3211, even though such remedy is restricted to the recovery of money due by contract.

[Ed.—For other cases see Corporations, Cent. Dig. §§ 197-209, 213-218; Dec. Dig. § 76.* 3 Va.-W. Va. Enc. Dig. 538.]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.